No. 76-1069

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

CANADIAN NATIONAL RAILWAY COMPANY
AND CANADIAN PACIFIC LIMITED,
Appellants,

v.

THE UNITED STATES OF AMERICA AND
THE INTERSTATE COMMERCE COMMISSION,
Appellees.

On Appeal from the United States District Court for the District of Columbia

MOTION TO AFFIRM

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Intervenor in Support of
Appellees.

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Pursuant to Rule 16(1)(c) of the Rules of this Court, the Aluminum Company of Canada, Ltd. (Alcan)[1] moves that the judgment of the District Court be affirmed.

Statement

This is a direct appeal from a final judgment and decision of a three-judge district court (J.S. App. 1a-23a) unanimously upholding certain orders of the Interstate Commerce Commission and enjoining and restraining appellants and 32 other railroads from disobedience of those orders.

In Ex Parte No. 267, *Increased Freight Rates, 1970 and 1971*, 339 I.C.C. 125 (1971) the Interstate Commerce Commission, following extensive hearings, authorized a general railroad freight rate increase as follows:

[1] Alcan was a party in interest to the proceedings before the Interstate Commerce Commission and intervened as of right pursuant to 28 U.S.C. §2323 in the District Court action.

"(1) Intraterritorial traffic within the East—not more than 14 percent.

(2) Intraterritorial traffic within the South—not more than 6 percent.

(3) Intraterritorial traffic within the West—not more than 12 percent.

(4) Interterritorial traffic from and to all territories—not more than 12 percent.

(5) Import and export traffic not more than 12 percent and subject to the limitations heretofore prescribed in this report . . ." 339 I.C.C. at 257.

In purported compliance with the above authorization, appellants and other railroads filed tariffs effective April 12, 1971, containing a 14% increase on rates applicable to rail traffic moving between the United States and Canada. Shortly thereafter, two shippers filed a petition with the Commission complaining that iron ore moving from Canada to the United States is import traffic within the meaning of the Ex Parte No. 267 order and that only a 12% increase was authorized. Appellants and other railroads replied. On September 24, 1971, the Commission issued its order finding:

". . . iron ore moving from Canada . . . is import traffic . . . ."

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[2]Ex Parte No. 267 was a general revenue case wherein the focus of attention is upon the rialroads' need for revenue. The Commission determines whether an increase in rate levels is justified by the evidence of record and the amount. It normally exercises its discretion and grants "special permission" for the rialroads to deviate from tariff publishing and other rules, and an order is entered permitting the filing of tariffs containing increases up to the maximum amount allowed. Individual rates are considered in later proceedings following complaint or on the Commission's own initiative. See *Aberdeen & Rockfish R. Co.* v. *SCRAP*, 422 U.S. 289, 313-314 (1975); *New York* v. *United States*, 311 U.S. 284, 350 (1947); *United States* v. *Louisiana*, 290 U.S. 70 (1933); *Florida Citrus Commission* v. *United States*, 144 F. Supp. 517, 521 (N.D. Fla. 1956) aff'd *per curium* 352 U.S. 1021 (1957); *Algoma Coal and Coke Co.* v. *United States*, 11 F. Supp. 487 (E.D. Va. 1935).

A cease and desist order was issued prohibiting the railroads from including in their tariffs more than a 12% increase on this traffic, and the railroads complied and corrected their tariffs.

On July 10, 1972, another shipper filed a petition with the Commission requesting a determination that the 12% limit on import-export traffic applied on all commodities moving from the United States into Canada. The Commission, on August 6, 1973, citing the September 24 order, issued a second cease and desist order prohibiting the railroads from including in their tariffs more than a 12% increase on rail rates from the United States to Canada. On August 23, 1973, Alcan filed a petition seeking to make the August 6 order applicable to traffic moving from Canada to the United States. Numerous railroads replied. Shortly thereafter, appellants and other railroads filed a petition seeking to vacate the August 6, 1973, order and requesting oral hearings. These petitions argued that U.S.-Canada rail traffic should not be considered "import-export." On October 10, 1973, the Commission denied the railroads' petitions to vacate the August 6 order and extended it to cover traffic moving in both directions between the United States and Canada. The railroads then sought judicial review.

The three-judge district court unanimously held *inter alia* that the orders of the Commission were interpretations and clarifications which did not alter or substantially change the meaning of the earlier Report and Order in Ex Parte No. 267 and that additional hearings were not required. (J.S. 13a-14a).

Argument

This appeal presents no substantial question warranting plenary review, and the judgment below should be affirmed. When appellants and other railroads in purported compliance with the Commission's Ex Parte No. 267 order published increases in excess of those authorized, the Commission, after receiving shipper petitions, properly required the railroads to cease and desist. The only question before the Commission was whether traffic moving to or from Canada is "import-export" within the meaning of the Ex Parte No. 267 order. This was plainly an interpretive question, and the District

Court correctly held that oral hearings were not required. *Pan American Petroleum Corp. v. Federal Power Commission*, 322 F.2d 999 (D.C. cir. 1963).

In any event, appellants have already had a full hearing on all issues. On April 10, 1973, Alcan filed a formal complaint with the Commission seeking reparations from appellants and other railroads for the overcharges resulting from the rate increases in excess of those authorized in Ex Parte No. 267. Oral hearings were held and briefs filed with the Commission on all issues including whether U.S.-Canada traffic is "import-export" within the meaning of the Ex Parte No. 267 order. On January 25, 1974, the Administrative Law Judge issued his recommended decision in Docket No. 35828 (unpublished) finding in favor of Alcan and awarding reparations. Appellants and other railroads filed exceptions, and on July 30, 1974, the Commission adopted the initial decision as its own.

Conclusion

The judgment of the District Court should be affirmed.

Respectfully submitted,

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Certificate of Service

I hereby certify that three copies of the foregoing Motion to Affirm were served on all known parties of record in this proceeding in accordance with Rule 33, paragraph 1, of the Rules of the Supreme Court of the United States, this _____ day of March, 1977.

Barry Roberts